INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	8

CITATIONS

Cases:

Amerada Petroleum Corp. v. *Federal Power Commission*, 231 F. 2d 461	7
Federal Power Commission v. *Texaco Inc. and Pan American Petroleum Corp.*, S. Ct. No. 386, O.T. 1963	5, 6
Hunt Oil Co. v. *Federal Power Commission*, 306 F. 2d 878	7
Pure Oil Co., 25 F.P.C. 383	3
Shell Oil Co. v. *Federal Power Commission*, C.A. 3 No. 14058, decided July 17, 1962 (unreported)	7
Sun Oil Co. v. *Federal Power Commission*, 304 F. 2d 293, certiorari denied, 371 U.S. 861	7
Superior Oil Co. v. *Federal Power Commission*, C.A. 9, No. 18252, decided August 26, 1963	6
Texaco Inc. v. *Federal Power Commission*, 317 F. 2d 796	4
United Gas Pipe Line Co. v. *Federal Power Commission*, 181 F. 2d 796, certiorari denied, 340 U.S. 827	7

Statutes and Regulations: Page

Federal Power Commission Regulations under the Natural Gas Act, as amended, Section 154.93, 18 C.F.R. (Cum. Supp. 1963) 154.93 2

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w, Section 19(b) 7

Miscellaneous:

21 Fed. Reg. 2388 3

26 Fed. Reg. 9732 3

Federal Power Commission Orders:

Order 232, 25 F.P.C. 379, 26 Fed. Reg. 1983 ..... 3, 4, 7

Order 232A, 25 F.P.C. 609, 26 Fed. Reg. 2850 ..... 3, 4, 7

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 387

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–18a) is reported in 317 F. 2d 796, at pp. 802–803 (C.A. 10, No. 7002). Order 242 of the Federal Power Commission (Pet. App. 28a–31a) is reported at 27 F.P.C. 339, 27 Fed. Reg. 1356.

JURISDICTION

The judgment was entered on May 20, 1963, and the petition for a writ of certiorari filed on August 19, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The Federal Power Commission amended its Rules and Regulations under the Natural Gas Act to provide that, in the future, contracts by gas producers would not be recognized or accepted in Commission proceedings if they contained certain types of price-changing provisions found incompatible with the public interest. The question presented is whether a court of appeals has jurisdiction under Section 19(b) of the Natural Gas Act to review the order promulgating that amendment or whether, as the court below held, review is available only when the Commission makes a specific application of the regulation to the party claiming aggrievement.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act are set forth in the petition at pp. 19a–24a.

STATEMENT

Petitioner sought review in the court of appeals of Federal Power Commission Order 242, issued on February 8, 1962. This order amended Section 154.93 of the Commission's Regulations under the Natural Gas Act to provide that contracts for gas sales executed by producers on or after April 2, 1962, may not be filed with the Commission as rate schedules if they contain provisions for changes in price other than the three types of provisions specified in the order (Pet. 6). The order also provided that contracts containing the proscribed provisions could not be filed in support of a producer's application for a certificate or serve as evidence of an adequate gas supply in a

pipeline certificate proceeding. The three permitted types of price-changing provisions are as follows:

(1) Changes which reimburse a seller for changes in production, severance, or gathering taxes laid on him;

(2) Changes to a specific amount on a definite date; and

(3) Changes based on price redeterminations made at intervals of not less than five years, and to a rate not higher than a producer rate in the same area not in issue in suspension or certificate proceedings, and subject to Commission jurisdiction.

Order 242 supplements Order 232–A, a prior Commission order providing that all but the three types of price-changing provisions enumerated above, if included in contracts executed on or after April 2, 1961, would "be inoperative and of no effect at law". Order 232–A, issued on March 31, 1961, 26 Fed. Reg. 2850, 25 F.P.C. 609, had modified a still earlier order (Order 232, 25 F.P.C. 379, 26 Fed. Reg. 1983) relating to the same subject. Order 232, as modified by Order 232–A, implemented by rule the Commission's decision in an adjudicatory proceeding, *Pure Oil Company*, 25 F.P.C. 383 (issued March 3, 1961)—a decision holding that indefinite escalation clauses in producer contracts were contrary to the public interest because such provisions have caused instability and uncertainty in the industry and among consumers. Both Orders 232 and 242 were promulgated after notices of proposed rule-making had been issued, 21 Fed. Reg. 2388; 26 Fed. Reg. 9732, and

after the receipt of comments by interested parties.[1] Thus, the order which petitioner sought to have reviewed in the court of appeals was based upon a policy formulated in two rule-making proceedings and an adjudicatory hearing. The Commission regulations implementing that policy had not, however, been applied to petitioner when it filed its petition in the court below.

Action on a motion by the Commission to dismiss the petition for review was deferred by the court of appeals pending argument on the merits. The court also consolidated the proceeding with other petitions (including one filed by petitioner) to review Commission rejections of specific filings pursuant to the regulations as amended by Order 242. After hearing argument, the court of appeals granted the Commission's motion to dismiss Pan American's petition in No. 7002 (as well as another petition by another company) on the ground that it was not aggrieved by the promulgation of the regulations, (Pet. App. 8a–10a, 317 F. 2d at 803). The same opinion, in dealing with two other cases, set aside specific actions taken by the Commission pursuant to the regulation. Indeed, one of these two cases involved the Commission's rejection of a filing tendered by the present petitioner. Pet. App. 13a–18a; *Pan American Petroleum Corporation* v. *Federal Power Commission*, 317 F. 2d 796, 804–807 (C.A. 10 No. 7303); *Texaco Inc.* v. *Federal Power Com-*

[1] In view of the time which elapsed between the Notice of Proposed Rulemaking in Order 232 and the issuance of the Order, the Commission postponed the effective date of the regulation to allow interested parties to comment further. Order 232-A amended Order 232 in response to these comments.

mission, ibid. (C.A. 10 No. 7217). The Commission has filed a petition for certiorari seeking reversal of the court of appeal's decision holding Orde. 242 invalid as there applied.[2] The instant petition (No. 387) deals only with the court's dismissal of the petition to review Order 242 itself (in C.A. 10 No. 7002).

ARGUMENT

1. The instant case (No. 7002 in the court of appeals) is one of a number of cases consolidated in the court below. The order of dismissal which petitioner challenges determined only that the Commission's exercise of its rule-making power was not reviewable until its regulation was specifically applied to the producer claiming aggrievement. In several of the other consolidated cases (including another case instituted by this same petitioner), the Commission's regulations had been applied, and there was no question of standing or aggrievement; in those cases, the court of appeals reached the question whether the Commission had power to deal with the subject matter at hand by an exercise of the rule-making authority. The court of appeals answered that question in the negative, and the Commission has petitioned for certiorari in those cases (No. 386, this Term).

It thus appears that the question of the Commission's power to adopt rules governing the price-changing practices of gas producers is already before the Court on the government's petition filed in cases where that issue is plainly ripe. If the Court should

[2] Petition for certiorari filed August 19, 1963, *Federal Power Commission* v. *Texaco Inc. and Pan American Petroleum Corporation*, No. 386.

grant the government's petition and reverse the decision below, the court of appeals, on remand of the case, would be required to decide the further question (which it did not reach) whether the particular regulation adopted is a reasonable one. Pan American would be heard on that issue since it is involved in No. 386 as a respondent. If, on the other hand, this Court should fail to disturb the holding challenged by the Commission, Pan American would have the benefit of a determination that the Commission's regulation was invalid because it was outside the rule-making power of the agency. On any view of the matter, it is difficult to see how grant of the instant petition of Pan American would do any more than complicate the procedings. It would serve only to inject an issue as to prematurity, albeit there are already before the Court cases which are indisputably ripe for its consideration.

One additional development should be noted before we turn to Pan American's contention that the court below erred in its disposition of case No. 7002. Since the date of the Tenth Circuit's decision in these cases, the Ninth Circuit has decided *Superior Oil Co.* v. *Federal Power Commission*, No. 18,252, August 26, 1963. By supplement to our petition in No. 386, we have brought this decision to the attention of the Court. The Ninth Circuit, as we there point out, has concluded (1) that the Commission has authority to regulate the pricing practices in question by rule and (2)

that the particular rule adopted by the Commission was neither arbitrary nor capricious. We have every reason to believe that a petition for a writ of certiorari will be filed by Superior Oil in that case, in which event the Court will have before it both of the questions noted immediately above. If the writ should be granted in the *Superior* case, the government would have no objection whatever should Pan American wish to file a brief *amicus curiae* in that case in order to address itself to the merits of the particular rule adopted.

2. As to the immediate question whether the court of appeals correctly dismissed case No. 7002 as premature, we point out that only last Term this Court refused to review a comparable decision of the Fifth Circuit which ruled that the Commission's Orders 232 and 232-A were not reviewable in advance of their application to a concrete case, *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293, certiorari denied, 371 U.S. 861.[3]

Pan American does not suggest that the reviewability of Order 242 presents any question different from that involved in an effort to secure review of Orders 232 and 232-A. The court below (Pet. App. 10a, 317 F. 2d at pp. 802-803) relied upon prior

[3] In holding Orders 232 and 232-A non-reviewable, the Fifth Circuit recognized that the validity of the amended regulation would be subject to review when properly presented on a specific application of the regulation by the Commission.

decisions under Section 19(b) of the Gas Act[*] holding that "a person is not aggrieved [within the meaning of that Section] by a general order and cannot complain until a personal right is impinged by a special order" and that "a party who has not been, and may never be, affected by the order except in a theoretical manner * * * [is] not aggrieved within the meaning of § 19(b)." It cited, among others, the *Sun Oil* case, *supra*, as well as the *Shell* and *Hunt* cases (*supra*, note 4), both of which held that this very Order 242 was not reviewable in the abstract. No intervening circumstance suggests that there is any more reason to grant the instant petition than the one denied in the *Sun Oil* case.

On the contrary, the question which this petitioner seeks to raise—whether Order 242 may be challenged before it has been applied—has obviously receded in importance, for, as pointed out above, the order has now been repeatedly applied, and there is currently pending before the Court a case in which the underlying substantive issues are squarely presented, *supra*, note 2.

---

[*] *E.g.*, *Amerada Petroleum Corp.* v. *Federal Power Commission*, 231 F. 2d 461 (C.A. 10); *United Gas Pipe Line Co.* v. *Federal Power Commission*, 181 F. 2d 796, 799 (C.A. D.C.), certiorari denied, 340 U.S. 827; *Sun Oil Co.* v. *Federal Power Commission*, 304 F. 2d 293 (C.A. 5), certiorari denied, 371 U.S. 861; *Shell Oil Co.* v. *Federal Power Commission*, C.A. 3, No. 14058, decided July 17, 1962 (unreported); *Hunt Oil Co.* v. *Federal Power Commission*, 306 F. 2d 878 (C.A. 5).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RALPH S. SPRITZER,
Assistant to the Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

PETER H. SCHIFF,
Attorney,
Federal Power Commission.

SEPTEMBER 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963